

## A PLEA FOR APPELLATE REVIEW OF SENTENCES

An examination of methods for determining sentence will result in the startling realization that the protections in most jurisdictions surrounding the determination of sentence are indeed miniscule. By comparison, the guilt determination process is controlled by many rules of evidence, by many tight procedural rules, and by a carefully structured system of appellate review designed to avoid even the slightest error.

Yet in the vast majority of criminal convictions in this country—90% in some jurisdictions; 70% in others—the issue of guilt is not disputed.

What is disputed and . . . what is the only real issue at stake, is the question of the appropriate punishment.<sup>1</sup>

One judge has stated

It is then [when the man stands in the dock convicted and awaiting sentence] that the whole intricate network of protections and safeguards which were his at the trial vanishes and gives way to the widest latitude of judicial discretion. What happens at this juncture depends largely on the judge's conscience or, as some have suggested, the state of his digestion. Nine out of ten defendants plead guilty without trial. For them the punishment is the only issue, and yet we repose in a single judge the sole responsibility for this vital function.<sup>2</sup>

It is interesting to note that this vast breakdown of safeguards exists nowhere else in the free world except the United States.<sup>3</sup>

Although the call for appellate review of sentencing within the United States has received more official support within the last 10 years,<sup>4</sup> the majority of states and the federal courts still leave the sentencing decision solely in the discretion of the trial court judge. Review, then, is available only when the sentence is illegal (that is, only when the sentence imposed is above the statutory maximum).<sup>5</sup>

Is there a need for general appellate review of criminal sentencing in all states? This question has generated substantial controversy in recent

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<sup>1</sup> ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCING (Tent. Draft, April 1967) at 1 [hereinafter cited as ABA STANDARDS].

<sup>2</sup> *Appellate Review of Sentences*, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit, 32 F.R.D. 249, 265 (1962) (remarks of Judge Sobeloff) [hereinafter cited as *Appellate Review of Sentence*].

<sup>3</sup> ABA STANDARDS at 2; Mueller and Fré Le Poole, *Appellate Review of Legal but Excessive Sentences: A Comparative Study*, 21 VAND. L. REV. 411, 419 (1968).

<sup>4</sup> ABA STANDARDS; THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORTS: THE COURTS (1967) [hereinafter cited as PRESIDENT'S COMMISSION]; COUNCIL OF STATE GOVERNMENTS PROPOSAL, *quoted in* ABA STANDARDS, *supra* note 1, at 90.

<sup>5</sup> *Appellate Review of Sentences*, *supra* note 2, at 260 (remarks of Judge Kaufman); Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960).

years. In order to make a decision, one must carefully examine the arguments on both sides of the question.

## I. IN SUPPORT OF APPELLATE REVIEW

### A. Reduction of Sentence Disparity

Perhaps the most widely advanced argument for appellate review is that it would reduce the disparity which arises from the imposition of unequal sentence for similar offenses without any reasonable basis.<sup>6</sup> The Federal Bureau of Prisons Statistical Report for Fiscal Years 1967 and 1968 illustrates the wide disparity among federal districts. For example, the national average sentence for narcotics violation in 1967 was 68.3 months. The Southern District of Ohio had an average of 180 months while the Eastern District of Illinois had an average of 12 months.<sup>7</sup> In another area, two embezzlers were convicted in the same courthouse during the same week but in different court rooms. There was little ground to distinguish the cases but one defendant was given 15 years while the other only 30 days.<sup>8</sup>

Chief Justice Earl Warren described sentence disparity as "a road block to the effective administration of justice."<sup>9</sup> The President's Commission on Law Enforcement and the Administration of Justice has recognized that

[t]he existence of unjustified disparity has been amply demonstrated by many studies. [citations omitted] It is a pervasive problem in almost all jurisdictions . . . .

. . . .

Unwarranted sentencing disparity is contrary to the principle of even-handed administration of criminal law.<sup>10</sup>

The existence of this disparity is recognized not only by judges<sup>11</sup> and various legislative commissions<sup>12</sup> but also by the victims of the disparity. In *An Eye for an Eye*,<sup>13</sup> the convict authors elucidate the evidence of unjust sen-

<sup>6</sup> S. KADISH AND M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 1287 (2nd ed. 1969).

<sup>7</sup> See U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF PRISONS, STATISTICAL REPORT 46-47 (1967); Tydings, *Ensuring Rational Sentences—The Case for Appellate Review*, 53 J. AM. JUD. SOC'Y 68, 69 (1969). For other examples see Bennett, *Count Down for Judicial Sentencing*, 28 J. BAR ASS'N OF D.C. 420 (1961); D'Esposito, Jr., *Sentencing Disparity: Causes and Cures*, 60 J. CRIM. L.C. AND P.S. 182 (1969); Comment, *Texas Sentencing Practices: A Statistical Study*, 45 TEXAS L. REV. 471 (1967).

<sup>8</sup> Bennett, *supra* note 7.

<sup>9</sup> Halperin, *Appellate Review of Sentence in Illinois—Reality or Illusion?*, 55 ILL. BAR J. 300 (1966).

<sup>10</sup> PRESIDENT'S COMMISSION, *supra* note 4, at 23.

<sup>11</sup> *Appellate Review of Sentences*, *supra* note 2 (remarks of Judges Sobeloff and Kaufman).

<sup>12</sup> COUNCIL OF STATE GOVERNMENTS PROPOSAL, *quoted in* ABA STANDARDS, *supra* note 1, at 90; CONN. GOVERNOR'S PRISON STUDY COMMITTEE, FIRST INTERIM REPORT 1 (1956), *quoted in* 69 YALE L.J. 1453, 1460 (1960).

<sup>13</sup> H. GRISWOLD, *AN EYE FOR AN EYE*, Chap. 6, (1st ed. 1970).

tence disparity and call for its elimination, partially through review of sentences. The President's Commission has found that prisoners do compare sentences with the result that "... a prisoner who is given cause to believe that he is the victim of a judge's prejudices often is a hostile inmate, resistant to correctional treatment as well as discipline."<sup>14</sup>

The call for reduction of disparity is advanced not only because of a concept of fair dealing by the judicial system but also because of the effects a disparate sentence will have on the individual and on society.<sup>15</sup> There are four basic reasons for imposing a sentence on a "wrong-doer": 1) recidivism, 2) deterrence, 3) retribution and 4) rehabilitation.<sup>16</sup> Only the prevention of recidivism is served by an excessive or disparate sentence while the other goals are offended by it. Retribution is based on the concept that the wrong-doer should pay for his crime, not for more than his crime in some cases and less in others. Deterrence is based on the theory that punishment will discourage the offender after release and the community at large from committing criminal conduct similar to that of the offender. In order to be so discouraged, a possible offender must see that the punishment is sufficiently severe to outweigh the possible gain from the crime. It is impossible to calculate the results of a certain offense if like crimes in similar circumstances are given disparate sentences. Rehabilitation is based on the concept of re-educating a person to society which is much harder to achieve if the convict feels that he was treated unfairly.<sup>17</sup>

Before leaving the discussion of disparity, one must realize that the supporters of appellate review as a method to reduce disparity are not calling for a uniform sentence for each offense. Individualization of sentences is designed to take into consideration factors which will better effectuate the goals of sentencing on a particular wrong-doer.<sup>18</sup> This concept authorizes the judge to consider not only the crime committed but also the motive and the convicted man's background when making a decision as to the proper sentence. This concept will lead to a different sentence for an equal crime because the defendants are different. Appellate review is designed not to take this individualization out of the sentencing process but rather to see that equal sentences are given to equal defendants for equal crimes. By definition, individualization in the sentencing process requires a judge to consider factors particular to the individual. Considering the large case load of trial court judges, it is only natural to expect that even

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<sup>14</sup> PRESIDENT'S COMMISSION, *supra* note 4, at 23.

<sup>15</sup> Tydings, *supra* note 7, at 68; Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453, 1459 (1960) (hereinafter *Connecticut Study*).

<sup>16</sup> Halperin, *Sentence Review in Maine: Comparisons and Comments*, 18 ME. L. REV. 133, 134 (1966); Tydings, *supra* note 7, at 63.

<sup>17</sup> *Connecticut Study*, *supra* note 15, at 1459.

<sup>18</sup> *Id.*

the most conscientious judge might miss a factor important in the determination of the sentence.

Without appellate review there is little chance, if any, to correct the damage done by a sentence which failed to take a factor into consideration. It has been suggested that the parole board could be utilized to correct disparate sentences but this method has serious drawbacks. First of all, it would be of little benefit to the offender who received a short but improper sentence as his sentence would be served before the parole board could act. The offender given a longer sentence may also serve more than he should before the parole board can hear his case. Even if the convict has not served more than the proper sentence, he will have spent a substantial amount of time in prison not knowing whether the excessive sentence will ever be reduced. Thus, the parole boards would be largely ineffective as corrections of judges' unfairness. Even though reliance on parole boards might result in fairer treatment to some individuals, it will not reduce disparity prospectively. Review by appellate courts, on the other hand, does offer a chance to prospectively reduce disparity by use of the court system rather than part of the correctional system.

One unfortunate circumstance which contributes to disparity is the lack of sentencing criteria or guidelines to assist a judge in the determination of an appropriate sentence. It was noted thirty-five years ago that

[t]he law gives the judge wide discretion in sentencing, but furnishes no assistance in exercising that discretion. In performing their ordinary judicial functions, judges base their actions either on statutes or on prior judicial decisions and practices. Controversies involving innumerable difficult legal questions have in the course of centuries been appealed to the . . . appellate courts . . . . These courts have written opinions recorded in vast legal libraries. But in the difficult and important task of sentencing offenders, there are almost no precedents or standards to follow. Since determining what sentence to impose has nearly always been a matter of judicial discretion, few opinions have been written to explain sentences.<sup>19</sup>

The situation today is basically the same. The trial judge has wide and often unlimited discretion to determine, without legislative or judicial guidance, which goals of sentencing are to be emphasized. Thus the individual trial judge is left to make instinctive decisions with little or no authority to affirm his beliefs. Other than a few studies and the judicial conferences on sentencing offered in several jurisdictions, the trial judge has little way of knowing whether his decisions are in line with other judges or with the feelings of the public. This criteria-knowledge void would be filled if appellate review of sentences were adopted and used properly by appellate judges. Policy guidelines would develop and unjust sentence disparity would be eliminated. The Chairman of the Senate Subcommittee on Improvements in Judicial Machinery has concluded that

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<sup>19</sup> S. WARNER AND H. CABOT, *JUDGES AND LAW REFORM*, 159-160 (1936).

[r]eview would encourage both trial and appellate courts to devote more attention to the theory and philosophy of sentencing. Appellate opinions on sentencing would provide a coherent body of case law embodying principles of sentencing to be applied at the trial level . . . . The development of a coherent body of case law . . . would allow trial judges the desired flexibility to exercise discretion within the bounds of previously decided principles of sentencing.<sup>20</sup>

This development requires appellate courts to view their function not only as a protector against "horrible sentencing examples"<sup>21</sup> but as policy-precendent making bodies. Implicit in this development is a requirement that reviewing courts must articulate their reasons for sentence changes. Thus the appellate court could be used to protect individuals by correcting grossly excessive sentences and also help to eliminate subsequent disparity through the development of sentencing principles.

#### B. Reduction of Technical Appeals and Strained Interpretations

The establishment of appellate review of sentences will be of benefit to appellate judges by permitting the judge to focus on what is often the real issue of many appeals—sentence severity. One must recognize that

[t]here is scarcely a court of appeals . . . whose calendars are not already congested with thinly veiled entreaties imploring it to find a loophole in the law so that a Draconian sentence may be upset. Many appeals are docketed today only because of the severity of the sentence pronounced in the district court and since the appellate tribunal cannot tackle the real issue in a forthright manner, it may, and often does, in its endeavor to strike down a harsh penalty, give the law a strained construction liable to work havoc in future cases . . . .

Where a court of appeals is in doubt on the substantive points of a close case, there is always the chance that it will allow an outrageous sentence to tip the balance toward reversal.<sup>22</sup>

The present system in most states of not allowing a sentence to be appealed encourages a defendant to appeal on a technical error. He does so with the hope that the appellate judge will use this slight error as a justification for reversal of the excessive sentence. If the judge is moved to reverse the decision because of the severe or disparate sentence, he often must rely on fanciful reasons which are precedent. With the adoption of appellate review of the sentencing decisions, the necessity of relying on fanciful reasons to reverse a severe sentence would be eliminated and less damage would be done to the substantive law.

#### C. Elimination of a Fearfully Overbroad Power in One Man

Perhaps there is another benefit of appellate review which, although

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<sup>20</sup> Tydings, *supra* note 7, at 73.

<sup>21</sup> *Connecticut Study*, *supra* note 15, at 1477.

<sup>22</sup> *Appellate Review of Sentences*, 32 F.R.D. 249, 271 (1962) (remarks of Judge Sobeloff).

hinted at by most advocates of such a system,<sup>23</sup> remains in the background of the whole sentence review movement. In states without sentence review, one man, through the exercise of his discretionary sentencing power, holds the future of others in his hands. Since the origins of this country, Americans have been nursed on the theory that unchecked power in the hands of one man is undesirable because power often corrupts. The adoption of an appellate review system would remove the seemingly unchecked power from the hands of one man. It is suggested that this theory and fear are a very real part of the call for appellate review.

## II. IN CRITICISM OF APPELLATE REVIEW

Not all people agree on the relative value of appellate review. There are those who for varied reasons prefer the sentencing system to remain as it is in the majority of states today. Arguments against appellate review can be divided into three categories: those which assert that appellate review is unworkable, those which assert that the goals of appellate review are not attainable, and those which try to show that the present system is best left undisturbed or is the best possible.

### A. Unworkability

The most common argument advanced against appellate review is that the appellate courts would be flooded with frivolous appeals.<sup>24</sup> Opponents argue that the appellate court system is already critically overburdened; that the enactment of a sentence review statute will "... open floodgates and drown appellate courts in a deluge of frivolous appeals, and that the costs [in time and money] of either articulation [of reasons for a particular sentence by a trial court judge] or review would be prohibitive."<sup>25</sup>

This argument, although valid to some extent, is reduced in persuasiveness by several factors. One such factor, referred to above, is that many of the appeals taken today are taken only because of the sentence imposed. It has been stated that:

... excessive and disproportionate penalties are a primary reason today why our courts are swamped by criminal appeals. Making the quantum of punishment an independent basis for appeal is not likely to increase appellate case loads to an unmanageable extent. It has not had that effect in Massachusetts or Connecticut where the appeal is to a special panel or in England where the jurisdiction is vested in the regular court of appeals.<sup>26</sup>

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<sup>23</sup> *Id.* at 262, 263, 273.

<sup>24</sup> Frankel, *The Sentencing Morass, and a Suggestion For Reform*, 3 CRIM. L. BULL. 365, 379 (1967).

<sup>25</sup> *Id.*

<sup>26</sup> *Appellate Review of Sentences*, 32 F.R.D. 249, 272-73 (1962) (remarks of Judge Sobeloff).

In addition,

[s]tate jurisdictions permitting appellate review . . . *have not* experienced an unmanageable burden on the reviewing court. . . . [Statistics do] not indicate that there would be a significant increase in caseload . . . . (emphasis added)<sup>27</sup>

Moreover, even if the adoption of an appellate review system would result in more appeals taken so as to tax the courts more than at present, "this objection completely evades the issue of whether an appeals procedure is needed to insure the quality of justice that should characterize our courts."<sup>28</sup>

#### B. Unattainability of Goals

Opponents of appellate review argue that the goal of uniformity is not attainable, or if so, only superficially.<sup>29</sup> It is argued that uniformity is not attainable because no two defendants are alike<sup>30</sup> and should not be treated alike. Opponents also argue that a sentencing policy will not result from the adoption of appellate review. These contenders point to studies<sup>31</sup> of two states with a reviewing system and suggest that appellate review does not appear to have substantially altered sentencing patterns.

The uniformity objection may be valid if, by uniformity, it is meant that equal sentences should be given for a given offense without regard for individuals' differences. But this argument distorts the true goal of appellate review.

. . . [W]hat is sought is not absolute uniformity but a uniformly fair and equitable approach. It's quite beyond legislative ingenuity to invent a slot machine that will dispense automatic justice either at the trial level . . . or anywhere. . . . but it would seem that the toughness of the problem is no reason to bar re-examination; rather, it is a ground for favoring it.<sup>32</sup>

Although the development of guidelines in jurisdictions with appellate review has not been as successful as hoped, and sentencing patterns may not have been altered beyond the lowering of grossly excessive sentences, there is still much hope that these changes will come about. Some writers have concluded that England, which has had appellate review for 50 years, has had progress in the development of sentencing policies and has altered its sentencing patterns.<sup>33</sup> The reason for the difference between the En-

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<sup>27</sup> Tydings, *supra* note 7, at 72.

<sup>28</sup> ABA STANDARDS, *supra* note 1, at 5.

<sup>29</sup> *Appellate Review of Sentences*, 32 F.R.D. 249, 279 (1962) (remarks of Judge Sobeloff).

<sup>30</sup> Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55 (1966).

<sup>31</sup> See Halperin, *supra* note 9, at 301; *Connecticut Study*, *supra* note 15, at 1462.

<sup>32</sup> *Appellate Review of Sentences*, 32 F.R.D. 249, 273 (1962) (remarks of Judge Sobeloff).

<sup>33</sup> MEADOR REPORT, quoted in ABA STANDARDS, *supra* note 1, at 128.

glish and American systems in development of policies is in the courts' view of their function.<sup>34</sup> English appellate courts realize that the development of sentencing policies is part of their function, whereas most American appellate courts empowered to review sentences see themselves only as protectors against grossly excessive sentences. Perhaps the legislature could assist appellate courts in recognizing their function, by expounding the purposes of sentence review within a sentence review statute.

### C. Undesirability of Sentence Review

Opponents of appellate review argue that the adoption of such a system will lead to undesirable results. It is argued that if per chance, some sort of uniformity develops, justice will be diminished through the sterility of sentencing. In other words, trial court judges will give a safe "sentence"—one which the trial court judge feels will not be reversed—even though he feels that the defendant deserves a longer sentence. The crux of this argument is that the trial judge will lose all the discretion which permits him to "individualize." With this discretion effectively taken away by the threat of reversal, the resulting sentences will be more unjust than the few disparate sentences which appellate review is alleged to cure.

Opponents to appellate review also argue that appellate court judges are not qualified to accept the responsibility over sentencing which such a system would give to them. This objection is based on various distinctions which arguably exist between appellate and trial court judges. It is argued that the trier of fact has the advantage of observing the defendant he is sentencing. Judge Brewster states that

[i]t is better to have one man with the advantage of having observed the particular defendant and others appearing and giving information, and with the further advantage of having theretofore observed many other defendants appearing for sentencing, than to have a panel of three judges, none of whom has ever seen the particular defendant involved during the sentencing proceedings, and most of whom has never seen any defendant during any sentencing proceedings.<sup>35</sup>

This special insight the trier of fact is able to achieve results both from seeing the individual defendant and from the type of experience a trial court judge has gained from observing and dealing with a succession of offenders.<sup>36</sup>

Over the years a trial court judge deals with a wide variety of defendants and thereby develops some expertise in recognizing factors important in the sentencing decision. Not only is the appellate court judge unac-

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<sup>34</sup> ABA STANDARDS, *supra* note 1; *Connecticut Study*, *supra* note 15, at 1462, 1477. Compare L. ORFIELD, CRIMINAL APPEALS IN AMERICA (1939) with S. WARNER AND H. CABOT, *supra* note 19, at 171.

<sup>35</sup> Brewster, *Appellate Review of Sentences*, 40 F.R.D. 79, 82 (1965).

<sup>36</sup> *Id.* at 80.



customed to dealing with the defendant's individual characteristics but he is also unaccustomed to dealing with matters of discretion. It is argued that the appellate courts have always been concerned with questions of law and not questions of fact. Thus the appellate court judges would not be qualified to question the trial judges' discretion. It is felt that the results of allowing such an intrusion in the discretion by unqualified judges would be so undesirable as to greatly outweigh any possible advantages to be achieved by appellate review.

Advocates of an appellate review system argue that the results alleged by the opponents either will not materialize or are not undesirable. Advocates urge that the trial judge will not lose his power to individualize. They state that appellate review is a method of supervising the sentencing system—it is not to take away the trial judge's discretion. One such advocate states

[d]iscretion in the trial judge there should certainly be but the objective is to provide a technique whereby discretion shall be allowed ample creative scope and yet be subject to some degree of discipline. . . . Naturally great weight should be given to his [the trial judge's] decision but it should not be held sacrosanct.<sup>37</sup>

The distinctions made between the trial court and the appellate court judges are partially valid but the supposed results associated with these distinctions are questionable. For example, opponents argue that the advantage of observing the defendant being sentenced and of having seen others in a like situation gives the trial court judge some special insight. This argument loses much of its potency when one realizes that up to 90% of defendants plead guilty at criminal trials. The judge's view of the defendant in these cases is very limited and its value questionable. Even a trial judge who has been sentencing for many years cannot look at a man and, by a "gut reaction" determine the proper sentence every time. If there is some truth to the theory that the trial judge gains some special knowledge of the defendant by seeing him for a prolonged period, this aspect could be taken up by the appellate court and still enable a "... dispassionate tribunal [to] re-examine sentences imposed by a trial judge who might be improperly swayed in his judgment by prolonged contact with the criminal defendant during the trial, or in extreme cases by popular emotions within the community."<sup>38</sup>

The argument against appellate review which essentially says that appellate court judges have not previously dealt with individuals overlooks the fact that there are a great number of appellate judges who have had extensive trial experience before their promotion to the appellate bench.

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<sup>37</sup> *Appellate Review of Sentences*, 32 F.R.D. 249, 273-74 (1962) (remarks of Judge Sobeloff).

<sup>38</sup> *Id.* at 262 (remarks of Judge Kaufman).

The last distinction which is said will result in undesirable consequences is that appellate courts are accustomed to handling questions of law rather than discretionary matters involving judgment.

But it is noted that:

[t]he law books are full of instances in which appellate courts have reversed the exercise of discretion by a trial judge. . . . In each of these instances, appellate courts are quite used to according latitude to the man on the scene, as it were. But where his judgment is wrong in principle, they do not hesitate to intervene. No more and no less is needed where the sentence is involved.<sup>39</sup>

It seems questionable whether any of the distinctions made between these two types of judges are at all relevant in a determination of whether to adopt a sentence reviewing system. These distinctions are important only if the appellate court would be performing the same functions as the trial court. Under a sentencing reviewing system the appellate court would not be performing the same function but would rather be developing policy and to watching over the trial courts so as to eliminate unjustified disparity. Of course

[i]t is true that in case of abuse [of the trial court's discretion] the appellate review would call that discretion into question. But that is as it should be. Totally unsupervised discretion is anarchy.<sup>40</sup>

The function of the appellate court would be to prevent this anarchy.

### III. POSSIBLE ALTERNATIVES TO SENTENCE REVIEW

Before a determination can be made to adopt a system of appellate review of sentencing there must be some consideration of the suggested alternatives to such a system. Opponents of appellate review have charged that to the extent uniformity of sentencing is desirable, it (along with the other objectives) can be achieved through better methods.

One of the suggested alternatives is the development of sentencing institutes<sup>41</sup> which could study and formulate policies. Some institutes have been held in the federal court system<sup>42</sup> but little seems to have been accomplished toward achieving the goals desired. This method would be helpful in achieving a sentencing policy if the institutes were held much more often and on a wider basis. The problem inherent in this method is that it offers no way to correct any disparity which may come about even after a policy is developed. In other words, there is no way to enforce this policy if a judge refuses to abide by it.

Another alternative suggested is the establishment of a sentencing coun-

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<sup>39</sup> ABA STANDARDS, *supra* note 1, at 5.

<sup>40</sup> *Appellate Review of Sentences*, 32 F.R.D. 249, 273 (1962) (remarks of Judge Sobeloff).

<sup>41</sup> Tydings, *supra* note 7, at 72.

<sup>42</sup> *Id.* at 70.

cil.<sup>43</sup> This council, to be made up of two or three judges including the judge trying the case, would make suggestions as to the sentence to be imposed. The judge who heard the case would still have the final decision as to the sentence imposed. This alternative could be effective in reducing some excessive sentences but since the judge imposing sentence is in no way bound by the advice and recommendations of the council, the possibilities for disparity and inequity still exist.<sup>44</sup>

California has extended the idea of a sentencing council by permitting the judge to determine only the type of sentence (fine, probation, county jail or state prison) to be imposed.<sup>45</sup> If the sentence is to the state prison, the Adult Authority, a non-judicial panel, determines the length of the sentence the offender will serve.<sup>46</sup> There are serious disadvantages to this type of system:

Board sentencing does not grapple with the basic problems of sentencing. . . . [I]t is not an approach to *sentencing*, it is an approach to only one part of it—*commitments*. Scientific *sentencing* involves the total judicial function—determining whether to suspend sentence, or use probation, or fine, or commit.<sup>47</sup>

As the Adult Authority has the power not only to fix the sentence but also to refix the sentence, there is an enormous pressure "to punish prisoners not solely for their crimes but also for their behavior in prison."<sup>48</sup> The system could also have an adverse effect on the offender who will never know exactly how much of the maximum sentence he will serve.

Mention must also be made of sentencing by jury rather than by the judge.<sup>49</sup> This method of sentencing, rather than decreasing disparity and establishing a sentencing policy, would tend to be worse than giving the trial judge complete discretion.

To be just to the defendant and at the same time protect the community, the sentence must be based on a professional analysis and evaluation of the offender and his crime.<sup>50</sup>

Most jury members have no experience in such analysis. With juries changing for every case, the elimination of disparity or the development of a sentencing policy would be impossible.

Although some of these suggestions may offer advantages, they are not entirely alternatives; in any system of sentencing there should be

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<sup>43</sup> *Id.* at 71.

<sup>44</sup> *Id.* at 71.

<sup>45</sup> CAL. PENAL CODE ANN. §§ 3020-3025 (West 1954).

<sup>46</sup> *Id.*

<sup>47</sup> S. RUBIN, *THE LAW OF CRIMINAL CORRECTION*, 130 (1963).

<sup>48</sup> *Id.* at 131.

<sup>49</sup> *Id.* at 122.

<sup>50</sup> *Id.* at 124.

some degree of appellate review available to articulate broad policies and ensure redress in individual instances where the system fails.<sup>51</sup>

Weighing the asserted advantages and the feasibility of a system of appellate review of sentences against the alleged disadvantages of the system, one seems compelled to advocate the adoption of such a system.

#### IV. SUGGESTED PROVISIONS TO BE INCLUDED IN AN APPELLATE REVIEW STATUTE

##### A. Methods of Adopting an Appellate Review System

Once the determination has been made to adopt appellate review of sentencing, the methods of adopting such a system must be explored. Thirteen states have adopted appellate review through *express statutory grants*.<sup>52</sup> The courts of six states have construed the appellate judge's statutory power "to reverse, affirm, or modify" as including the power to review the merits of a sentence.<sup>53</sup> Although it is asserted that any method of adoption is better than no appellate review of sentences at all, express statutory adoption is most desirable in that it permits the greatest control and planning over the development of a system of appellate review. There are several areas within the procedural aspects of an appellate review system which are controversial. For example, should the issue of sentence be presented to the present appellate court system along with other issues involved in the case, or should there be sentence review by a specialized tribunal? Should trial or appellate courts be required to state their reasons for a particular decision? What limitations should be placed on the availability of review? These and other questions have been asked concerning the adoption of an appellate review system.

If the system is adopted through the courts' construction of a general statute, many of these questions will remain unanswered until ruled upon. There will be a better opportunity to make a more reasoned and organized plan permitting appellate review through legislative adoption. An integrated plan rather than piece-meal judicial interpretation could simultaneously answer all the questions involved. The role of the appellate court in achieving the reviewing system's goals could be stressed through

<sup>51</sup> Tydings, *supra* note 7, at 70.

<sup>52</sup> ARIZ. REV. STAT. ANN. § 13-1717 (1956); CONN. GEN. STAT. ANN. §§ 51-194, 195, 196 (Supp. 1965); FLA. STAT. ANN. § 932.52 (Supp. 1966); HAWAII REV. LAWS § 212-14 (Supp. 1965); ILL. ANN STAT. ch. 38, § 117-3(e) (1964); IOWA CODE ANN. § 793.18 (1950); ME. REV. STAT. ANN. tit. 5, § 2141-§2144 (Supp. 1965); MD. ANN. CODE art. 26, §§ 132-138 (1966); MASS. GEN. LAWS ANN. ch. 278, §§ 28A-28D (1959); NEB. REV. STAT. §§ 29-2308 (1964); N.Y. CODE CRIM. PROC. §§ 543, 764; ORE. STAT. §§ 138.050, 138.090 (1963); TENN. CODE ANN. §40-2711 (1955).

<sup>53</sup> Bailey v. State, 381 S.W.2d 467, 474 (Ark. 1964); State v. Ledbetter, 83 Idaho 451, 364 P.2d 171 (1961); Hudson v. State, 399 P.2d 296 (Okla. Crim. App. 1965); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959); State v. Johnson, 67 N.J. Super. 414, 170 A.2d 830 (1961); State v. Tuttle, 21 Wis. 2d 147, 124 N.W.2d 9 (1963).

legislative mandate. Legislative planning and adoption would ensure that the questions discussed in the remainder of this article would be answered.

## B. Limitations on the Right of Appeal

Limitations of one kind or another upon the availability of review have been proposed in order to quell fears of a flood of frivolous cases. One of the more common limitations adopted is to permit review only for sentences exceeding a certain length.<sup>54</sup> Although it may be a political necessity to include such a limitation in a proposed statute, such an arbitrary limitation would defeat much of the effectiveness of a reviewing system. As one commentator has suggested, ". . . merely because a sentence is relatively brief does not assure that it is equitable, appropriate or not excessive."<sup>55</sup>

Another suggestion for limiting the possible number of sentence appeals is to grant review only if the defendant pleaded guilty.<sup>56</sup> A limitation such as this is unsound. It would not quell the fear of great numbers of appeals because up to 90% of defendants plead guilty.<sup>57</sup> This limitation is also undesirable because it would not protect defendants against judges and juries who, after the trial, failed to consider relevant factors or permitted their emotions to rule.

A third possible limitation is to grant reviewing courts the power to *increase*, as well as decrease, sentences which have been appealed. Various commentators, however, have raised substantial doubts as to whether the power to increase sentences discourages frivolous appeals; indeed, this may seriously limit the possibility of attaining the goals of a review system.<sup>58</sup> It has been theorized in a study of an appellate review system with a provision permitting increases in sentences that

[s]ince the Division has the power to increase as well as decrease sentences, creating a risk for the appellant, the majority of appeals have come from those prisoners who have the least to lose, those sentenced in the upper range of penalties for their offense.<sup>59</sup>

Since perhaps only these offenders with "the least to lose" will take the chance of appeal, it seems very unlikely that the system will provide a remedy to many deserving offenders or ample opportunity to develop any extensive sentencing policies.<sup>60</sup>

In view of the political and practical necessity of *some* limitation on

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<sup>54</sup> See ABA STANDARDS, *supra* note 1, at 15; Halperin, *supra* note 16, at 135; *Connecticut Study*, *supra* note 15.

<sup>55</sup> Tydings, *supra* note 7, at 72.

<sup>56</sup> ORE. REV. STAT. §§ 138.050, 168.090 (1963).

<sup>57</sup> ABA STANDARDS at 1.

<sup>58</sup> Halperin, *supra* note 16, at 138; *Connecticut Study*, *supra* note 15, at 1464.

<sup>59</sup> *Connecticut Study*, *supra* note 15, at 1464.

<sup>60</sup> It is interesting to note that the English Review Courts had this power and formally abandoned it in 1965 with legislative abandonment coming in 1966. Tydings, *supra* note 7, at 72.

sentence appeals, one of the best suggestions thus far seems to be some sort of discretionary screening system, developed by the courts, to safeguard against frivolous appeals. One possibility would be to establish a procedure for seeking and granting leave to appeal similar to the rules adopted in England or Massachusetts.<sup>61</sup> Another proposed criterion for granting appellate review is the A.B.A. proposal that

[i]f a case would . . . be serious enough to warrant review of a trial leading to conviction . . . it would be serious enough to warrant review of the sanction imposed.<sup>62</sup>

### C. The Proper Court for Sentence Review

Another controversial issue concerning the establishment of an appellate review procedure is over what court should have the power to review sentences. The issue is whether or not to distinguish appeals relating to sentences from appeals based on the merits of the conviction. The A.B.A. Proposal and the majority of states with appellate review vest the sentence reviewing power in the existing appellate courts.<sup>63</sup> It is argued that

[t]he use of regular appellate courts to review sentences will thus have the virtue of arming such courts, which must in any event bear the main burden of review in criminal cases, with the power to resolve the whole case before them.<sup>64</sup>

Another advantage to the single reviewing court is that it will prevent litigation over jurisdictional questions. If two distinct courts are used much unnecessary litigation will result in an attempt to draw the line between the process of convicting; that is, it may be difficult to determine whether a complaint goes to the issue of a "wrongful" conviction or of a "wrong" sentence. It is argued that this litigation could be prevented if one court ruled on all issues. A third argument given in favor of a single reviewing system is that it would be much easier and quicker to implement a sentence reviewing system into the existing system than to start a whole new system.

The advocates of a dual reviewing system argue that the alleged advantages of the single system are illusionary. The handling of all appellate issues by a single court may avoid the "jurisdictional" problems, but is it desirable to avoid the other questions? In a hard case, there would be

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<sup>61</sup> MASS. ANN. LAWS ch. 278, § 28B (1956). For a discussion of the working of the English system see MEADOR REPORT, *quoted in* ABA STANDARDS, *supra* note 1, 115-117.

<sup>62</sup> ABA STANDARDS, *supra* note 1, at 17.

<sup>63</sup> ARIZ. REV. STAT. ANN. § 13-1717 (1956); FLA. STAT. ANN. § 932.52 (Supp. 1966); HAWAII REV. LAWS § 212-14 (Supp. 1965); ILL. ANN. STAT. ch. 38, § 117-3(e) (1964); IOWA CODE ANN. § 793.18 (1950); NEB. REV. STAT. §29-2308 (1964); N.Y. CODE CRIM. PROC. §§ 543, 764; ORE. REV. STAT. §§ 138.050, 138.090 (1963); TENN. CODE ANN. § 40-2711 (1955); ABA STANDARDS, *supra* note 1, at 32, 33.

<sup>64</sup> ABA STANDARDS, *supra* note 1, at 35.

temptation to take the "easy way out" and settle the "question of the legality of the conviction with the question of the propriety of the sentence"<sup>65</sup> by compromise and simply lower the sentence.<sup>66</sup> Placing both types of issues in the hands of one court may create problems from the standpoint of court procedure. Although it would be easy to give existing appellate courts one more issue to handle, those courts would not have the procedures and rules necessary to make further investigations or to consider information beyond the trial court record. Such provisions could be easily adopted but the effect of such provisions would be hard to limit solely to the sentencing issue. It would seem to be easier to make new provisions specifically designed for the new issue to be used by a new court than to integrate these needed provisions into the conventional appellate rules.<sup>67</sup>

One of the greatest advantages of a separate reviewing court would be that the prohibitive procedures and expenses involved in an appeal on the merits of the case could be effectively by-passed. A sentence reviewing court could be operated with fewer formalities than the present appellate courts. As briefs are generally used "to isolate and expose issues of law,"<sup>68</sup> they would not be necessary if the appeal were before a court with the issue squarely before it. It would even be possible for the man convicted, with instructions from the court or prison officials, to file some papers necessary to point out why his sentence should be reduced. In this way, appeals can be open to all convicted defendants, not just those who can pay. Adopting a separate court would enable the case to be heard much sooner, since the court would not be burdened by a large backlog of cases. Upon an examination of the advantages and disadvantages of each system one must agree that the specialized sentence reviewing court is the better alternative in terms of the availability and viability of a reviewing system.

#### D. The Need for a Court's Articulation of Reasons for a Sentence

Above there was some mention of a requirement that reviewing courts articulate their reasons for sentence changes. This type of provision is important because

[t]o improve sentencing decisions, the Review Division must write opinions which clearly describe the relationship between the factors involved in a specific case and the aim or aims of the criminal law that should be emphasized in that case.<sup>69</sup>

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<sup>65</sup> Halperin, *supra* note 16, at 145.

<sup>66</sup> See, e.g., *People v. Cage*, 32 Ill. 2d 530, 216 N.E.2d 805, 807 (1965).

<sup>67</sup> Examples of provisions difficult to integrate into the existing appellate rules are provisions made to secure more information than exists in the record and provisions for an appearance by the defendant. Existing Appellate Rules generally disallow these types of provisions which should be used for the sentencing issue but not other issues. It would be difficult to limit the influence of such provisions to only one issue.

<sup>68</sup> Halperin, *supra* note 16, at 145.

<sup>69</sup> *Connecticut Study*, *supra* note 15, at 1466.

Although there is controversy over the necessity and importance of such a requirement,<sup>70</sup> the chances of developing some sort of sentencing criteria and policies would surely be enhanced by a statement giving the reasons for a change in sentence.

Another provision which should be included in the establishment of a sentence reviewing system is a requirement that trial court judges, as well as appellate judges, state their reasons for imposing a certain sentence on a particular defendant. There are, of course, problems with such a provision. One judge states that "most judges would not like to write all the reasons why they have imposed sentence."<sup>71</sup> Surely this is one reason for including such a provision. A statement of reasons would be of service to an appellate court in that it would show what factors the trial court considered. Such a statement would also serve to present the state's position on an appeal. This requirement could also benefit the rehabilitative aspect of sentencing because the man convicted would know why he received the sentence that he did.<sup>72</sup>

## V. CONCLUSION

Appellate review of criminal sentences offers much hope for the future elimination of disparity.

[E]ven as it now imperfectly operates in those jurisdictions providing it, [the system] accomplishes ends sufficiently valuable to warrant its application; if supplemented by [the above provisions], its merits would be significantly magnified.<sup>73</sup>

A system of appellate review, to be completely successful, requires more than just the provisions above. It requires the appellate courts to realize its importance in the betterment of the existing sentencing system. The success of the system requires these judges to view their role as more than protectors against grossly excessive sentences. If they do adopt a wider view, much more can be accomplished in the area of improving criminal sentencing.

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<sup>70</sup> See note 34, *supra*.

<sup>71</sup> *Appellate Review of Sentences*, 32 F.R.D. 249, 284 (1962) (remarks of Judge Walsh).

<sup>72</sup> Frankel, *supra* note 24, at 379.

<sup>73</sup> *Id.* at 371.